No. 75-1827

In the Supreme Court of the United States

OCTOBER TERM, 1976

LEON GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 534 F. 2d 523.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1976. On April 30, 1976, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including June 18, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred by declining to conduct a hearing on petitioner's motion to suppress certain evidence.

2. Whether the designation by the grand jury of two individuals as "unindicted co-conspirators" denied petitioner due process of law.

3. Whether the district court's instructions to the jury erroneously defined "reasonable doubt."

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit mail fraud and of four counts of mail fraud, in violation of 18 U.S.C. 371 and 1341. He was sentenced to two years' probation, fined $9,000, and required to pay the costs of prosecution.

Petitioner's statement of the case (Pet. 4-7) primarily reflects his version of events. The evidence taken in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80) tells a somewhat different story. During 1970 petitioner, then president of Monticello Raceway in Sullivan County, New York, conspired with Paul Grossinger, owner of the Grossinger Hotel and vice president of the raceway, and with Bernard Roth, the hotel's comptroller, to bill the raceway for services not actually rendered to it; the payments by the raceway for these nonexistent services were used to defray most of the cost of a bar mitzvah held at the hotel for petitioner's son (Tr. 47-49, 53-58, 182-184, 189-190). The spurious bills were sent to the raceway by mail, and "payment" of $4,856.16 was made by return mail (Tr. 58, 60-61). Following the bar mitzvah the hotel sent petitioner a bill for $5,843.25, which he returned with a note requesting that they verify the correctness of the bill (Tr. 78-80, 83). Grossinger and Roth then reduced petitioner's bill by the amount that the raceway had paid for the nonexistent services (Tr. 83, 85, 87, 188, 191).

After concluding that the evidence was sufficient to support petitioner's convictions, the court of appeals wrote that petitioner's other arguments, which he repeats here, "do not call for discussion" (Pet. App. A-3).

ARGUMENT

1. In January 1974 the New York State Organized Crime Task Force began an investigation into the alleged "fixing" of horse races at the raceway. Records of the raceway were obtained pursuant to subpoenas addressed to corporate officers or directors. Following hearings on an application to quash the subpoenas, a Justice of the Supreme Court of New York ordered the return of the records to the corporation.

The Appellate Division affirmed, holding that under state law the Task Force had not made a sufficient showing of authority or a demonstration that the inquiry was relevant to a matter within its jurisdiction. *Sussman* v. *New York State Organized Crime Task Force*, 48 A.D. 2d 154, 368 N.Y.S. 2d 588. A federal grand jury then subpoenaed the records of the raceway from the State of New York. The State applied to the Appellate Division for an order to permit delivery of the records. The raceway did not oppose the motion, and it was granted on December 3, 1974.

Prior to trial petitioner moved to suppress certain of these records.[1] He argued that the corporate records had been illegally obtained by the State and that the

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[1]The five bills for the raceway's purported outings (Gov. Exhs. 2A to 2E), the summary of the bills (Gov. Exh. 2F), the monthly statement reflecting the bills (Gov. Exh. 26; Tr. 59-60), the check drawn by petitioner and the raceway's comptroller in payment of the bills (Gov. Exh. 3), and a duplicate copy of the check retained by the raceway's comptroller, were obtained by subpoena and introduced at trial.

federal authorities were involved in both the original illegality and the use of the evidence. The district court denied the motion without a hearing, and petitioner contends that this was error (Pet. 15-19). It was not. Evidentiary hearings on motions to suppress "need not be set as a matter of course" (*United States* v. *Ledesma*, 499 F. 2d 36, 39 (C.A. 9), certiorari denied, 419 U.S. 1024). See also, *e.g.*, *United States* v. *Poe*, 462 F. 2d 195, 197 (C.A. 5), certiorari denied, 414 U.S. 845. Where it can be determined as a matter of law that suppression is unnecessary, no hearing should be held. *United States* v. *Warren*, 453 F. 2d 738, 742-743 (C.A. 2), certiorari denied, 406 U.S. 944; *Cohen* v. *United States*, 378 F. 2d 751, 760 (C.A. 9), certiorari denied, 389 U.S. 897.

Petitioner argues that the evidence was illegally seized by the State and released on a "silver platter" to federal authorities. There are two roadblocks to petitioner's argument. First, none of the evidence was a personal record of petitioner; each item introduced in evidence was the property of the Raceway Corporation. Petitioner therefore has no standing to object to the seizure, for he was not the sole stockholder of the corporation, and the documents were not exclusively prepared or retained by him. See *Mancusi* v. *DeForte*, 392 U.S. 364; *Henzel* v. *United States*, 296 F. 2d 650 (C.A. 5); cf. *United States* v. *Miller*, No. 74-1179, decided April 21, 1976, slip op. 9.[2] Second, any impropriety in the original seizure of the documents was purely a matter of state law and the scope of the Task Force's authority. Suppression in a federal prosecution is necessary only when the seizure violates the Constitution. *Wolfle* v. *United States*, 291 U.S. 7, 13;

[2]Because the items introduced were not the personal property of petitioner, the cases upon which he relies offer him no support.

Elkins v. *United States*, 364 U.S. 206, 223-224; *United States* v. *Dudek*, 530 F. 2d 684 (C.A. 6) (collecting cases); cf. *United States* v. *Peltier*, 422 U.S. 531, 553 n. 11 (Brennan, J., dissenting). Because there was no constitutional violation here, the district court properly declined to suppress the evidence.

2. Petitioner contends (Pet. 12-15) that the designation by the grand jury of Roth and Grossinger as "unindicted co-conspirators," and the district court's reference to them in this fashion, denied him due process of law. There is nothing to this argument. *United States* v. *Briggs*, 514 F. 2d 794 (C.A. 5), which held that a grand jury is not empowered to accuse persons of crime unless it names them as defendants,[3] dealt only with the rights of the unindicted persons. Petitioner, as an indicted defendant, has no cognizable interest in the reputations of third parties named as unindicted co-conspirators. There is no reason to believe that the mention of Roth and Grossinger in the indictment denied petitioner a fair trial. Both Roth and Grossinger testified for the prosecution at trial; petitioner has not argued that their cooperation was a result of their designation by the grand jury.[4]

[3]But see *Paul* v. *Davis*, No. 74-891, decided March 23, 1976, which held that the Due Process Clause does not bar the police from publicly accusing a person of crime.

[4]Indeed, petitioner never asked to have the names deleted from the indictment before or during trial. This issue arose only because the district court gave an "accomplice instruction" informing the jury to scrutinize the testimony of Grossinger and Roth with some care, because they "admittedly participated in acts charged in the indictment as crimes" (Tr. 640). Such an instruction is proper. *United States* v. *Abrams*, 427 F. 2d 86 (C.A. 2), certiorari denied, 400 U.S. 832. Petitioner apparently has abandoned any challenge to the accomplice instruction (to which he objected at trial) in favor of his argument about the unindicted co-conspirator designation (which he did not raise at trial).

3. Petitioner contends (Pet. 8-11) that the district court's instruction to the jury defining "reasonable doubt" as "a doubt which is substantial and not merely shadowy" (Tr. 635) is inaccurate. He argues that the term "reasonable" should have been substituted for "substantial." This argument does not adequately account for *Holland* v. *United States*, 348 U.S. 121, 139-140, affirming 209 F. 2d 516, 522 (C.A. 10), which approved a reasonable doubt instruction defining the phrase as a "substantial doubt, not a trivial doubt."[5] See also *United States* v. *Bridges*, 499 F. 2d 179 (C.A. 7); *United States* v. *Atkins*, 487 F. 2d 257 (C.A. 8); *United States* v. *Aiken*, 373 F. 2d 294 (C.A. 2), certiorari denied, 389 U.S. 833.[6] The instruction was proper,[7] and there was no error in petitioner's case.

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[5]*In re Winship*, 397 U.S. 358, has not cast doubt upon *Holland*. The issue in *Winship* was whether proof beyond a reasonable doubt is required in juvenile delinquency adjudications. The Court had no occasion to pass upon the adequacy of different definitions of reasonable doubt.

[6]These cases, far from conflicting with the decision below, as petitioner asserts (Pet. 8-9), indicate approval of instructions similar to that given here.

[7]The whole instruction on reasonable doubt was as follows (Tr. 635-636):

> A reasonable doubt is one that appeals to your reason, to your judgment, to your common sense and to your experience. It is not an excuse to avoid performance of an unpleasant duty. A reasonable doubt is such as would cause prudent people to hesitate before acting in matters of importance to themselves.
>
> Putting that a little differently, if you are confronted, as indeed you are here, with an important decision, and after reviewing all the factors that are pertinent to that decision you find yourself beset by uncertainty and unsure of your judgment, then you have a reasonable doubt. Conversely, in that same situation, if you have taken into account all the elements that pertain to the problem, and you find that you have no uncertainty, and no reservations about your judgment, then you have no reasonable doubt.
>
> Proof beyond a reasonable doubt does not mean proof to a positive certainty or proof beyond all possible doubt. If that were the rule, few persons, however guilty, could ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any fact which by its nature is not susceptible of mathematical certainty. So that kind of certainty, as I have tried to indicate, is not the test. You are going to have to rely upon your own common sense and general experience in evaluating the evidence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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